

SEP 24 1983

ALEXANDER L. STEVENS,
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NO. 83 - 128

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES OF AMERICA, Petitioner,

vs.

WILLIAM GOUVEIA, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT ADOLPHO REYNOSO IN
OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under any circumstances, a federal prisoner placed in administrative detention on suspicion of committing a crime in prison and undergoing a criminal investigation is constitutionally entitled to an attorney prior to indictment?

2. Whether dismissal of the indictment is the appropriate remedy where an indigent federal prisoner is held in solitary confinement for 19 months as a suspect in a murder investigation and his requests for appointed counsel are denied until he is formally indicted 20 months after the alleged crime?

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption of this case, Adolpho Reynoso, Robert Ramirez, Philip Segura, Robert Eugene Mills, and Richard Raymond Pierce were appellants below and are respondents here.

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OPINION BELOW

The opinion of the Court of Appeals
is reported at 704 F.2d 1116 (9th Cir.
1983).

JURISDICTION

The judgement of the Court of Appeals was entered on April 26, 1983. The petition for writ of certiorari was filed by the Government on July 25, 1983, after being granted a thirty-day extension of time. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

On November 11, 1978, at approximately 12 noon an inmate named Thomas "Trejo" was stabbed to death in M Unit, at the Federal Correctional Institution, Lompoc, California. There were no eye witnesses to the murder. The body of Trejo was discovered at approximately 4:00 in the afternoon.

On the evening of November 11, 1978, Respondent REYNOSO, Pedro Flores (acquitted in the first trial of all counts) and Respondent William Gouveia were locked down in the isolation unit at Lompoc as suspects in the murder of Trejo.

On November 22, 1978, Respondent REYNOSO was released from isolation to be returned to his unit. On December 4, 1978, Respondent and the other co-defendants were returned to administrative detention at Lompoc, pending investigation by the FBI and the Bureau of Prisons of the murder of Thomas Trejo. No attorney was appointed to represent Respondent during this period of time although requests for appointed counsel were made by Respondent.

From December 4, 1978 until his arraignment on July 14, 1980, Respondent

remained in administrative detention without assistance of counsel. No investigation was conducted; no evidence was preserved on behalf of the Respondent.

The Government by March, 1979, had virtually completed its investigation into the murder of Trejo. All witnesses called before the Grand Jury and known to the Government at the time of indictment had been located and interviewed prior to June, 1979. Dr. Gee, who performed the autopsy of Trejo, was available to the Government as early as November 11, 1978. Richard Villalobos, an inmate was interviewed as a co-operating Government witness in June, 1979. The principal witnesses at the Grand Jury proceeding, including Willard Taylor, a prison inmate, were known and available as early as November 11, 1978. No new percipient witness became available to the Government between

June 1979 and the date of indictment. Virtually all scientific evidence was completed by June, 1979.

A year later, on June 17, 1980, six individuals, including Respondent Adolpho Reynoso, William Gouveia, Philip Segura, and Robert Ramirez were indicted for the murder of Thomas Trejo. A month later on July 14, 1980, Respondent was arraigned and appointed counsel.

A period of twenty-one (21) months elapsed from the date of Trejo's murder to the appointment of counsel. The Government's case was established as early as June, 1979. No significant investigative activity was engaged in by the Government after June, 1979. The Government had methodically built its case between November, 1978 through June, 1979.

In contrast the defense lost the ability to develop a qualitatively sound defense.

Because of the long delay in bringing an indictment and the concurrent delay in appointing defense counsel, Respondent lost the opportunity to locate and call witnesses who could corroborate his two alibi witnesses.

Prison records were inadequate with regards to the identities of inmates present on November 11, 1978.

Those witnesses who could be located were found to have poor memories of the events, a fact the Government quickly seized upon to argue falsity of testimony. The one individual, Michael Thompson, who the defense claimed had actually committed the murder, along with Steven Kennard, had died of natural causes. An additional

witness named Baby Ramirez also died prior to trial. Most of the prison population at Lompoc in November, 1978, had been transferred to various parts of the United States. The Bureau of Prison's records were found to be incomplete, inaccurate, or unavailable. Only last names were included in the rosters provided, and of those provided, no assurances were made, though requested, that the rosters were for November 11, 1978.

In essence, while the Government had virtually completed their investigation, some twelve to fifteen months prior to the indictment, the Respondent remained in administrative confinement, isolated from the general population without resources to hire an attorney, and without the ability to develop and preserve a defense.

ARGUMENT

The Court of Appeals for the Ninth Circuit held that an indigent inmate held in administrative detention beyond ninety days and for the purpose of isolating him from the general prison population pending a criminal investigation, or trial for a criminal act, must be afforded an attorney at Government expense in order to preserve assurance of a fair trial. United States v. Gouveia, 704 F.2d 1116 (9th Cir. 1983) Since the Government's conduct in this case resulted in harm which was not capable of after-the-fact remedy, the Ninth Circuit ruled that the Respondents were in a position similar to suspects who were denied a speedy trial, and thus dismissal of the indictment was the only certain remedy. United States v. Gouveia, supra at 1125-1127.

A. The Right to Counsel

The right to counsel is more than a mere formalism; the right goes beyond the attorney's mere presence at formal judicial proceedings. McMann v. Richardson, 347 U.S. 759 (1970). The concept of the right to counsel:

" . . . is central to that principle that . . . the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in Court, or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment . . . "

United States v. Wade, 388 U.S. 218, 226-22 (1967).

It is the right to a fair trial that the Ninth Circuit has sought to assure. The Government takes the mechanical position that Kirby v. Illinois, 406 U.S. 682 (1972) does not under any

circumstances permit the right to counsel to attach before the bringing of formal adversary judicial proceedings.

The Government takes this position even though failure to appoint counsel to a person in a de facto arrest situation would lead to the derogation of a fair trial due to the denial of effective assistance of counsel. 1/

Respondents were in continuous isolation in administrative detention which

1/ It is ironic that the Government has taken the position that Respondents do not claim that respondents' counsel rendered ineffective assistance. (Petitioner's Brief pg. 14 n.9). What affective difference is there between an inadequate defense due to counsel's incompetency, e.g. failure to present available witness; and ineffective representation due to the loss of the same witnesses, or the presentation of witnesses with poor memories resulting from the inexcusable delay in bringing an indictment and appointing counsel? The result is the same: absence of a fair trial.

effectively cut them off from members of the general prison population. The reason for Respondent's continuous isolation was to restrict his freedom during the pendency of the criminal investigation. The Government makes no effort to distinguish between Respondent's situation, equivalent to an arrest, and the situation of a person arrested and segregated from the general population. The Government's position leads to inconsistency in the application of the Sixth Amendment right. A person arrested for a Federal crime is required to be arraigned "without unnecessary delay". Fed. R. Crim. P. 5(a). At that point, the accused is guaranteed the assistance of counsel. Clearly, a person arrested could not be indeterminately incarcerated, yet be denied assistance of counsel by the mere refusal to file formal charges. Yet, a prison inmate may be de facto arrested,

subjected to all the consequences of isolation and the passage of time, and yet, be denied the ability to secure representation by counsel.

The Court of Appeals choose not to do what the Government does -- ignore reality. Isolation of Respondent from the general prison population for the purpose of criminal investigation precluded him from early access to the general prison population. This coupled with the transient nature of the prison population, made it difficult if not impossible for Respondent, without assistance of counsel, to locate and identify potential defense witnesses. Witness statements could not be taken and preserved, thus, a tool to refresh the memory of the potential witness was lost. The affirmative defense that someone else committed the murder

could not be established, and a critical witness was lost.

In contrast, the Government had all the advantages. It had several agents at its disposal. These agents took the statements of all but one Government witness by December, 1978. One was taken in June, 1979. The statements were written down and later used to refresh the Government's witnesses' memories. The Government had the additional advantage that its witnesses had made their statements implicating the Respondent within days or weeks of the murder of Trejo. By contrast, the Respondent's witnesses were subject to the argument of recent fabrication, or subjected to assessments of low credibility due to poor memories.

As this Court stated in Esobedo v. State of Illinois, 378 U.S. 478, 487-488 (1964):

" . . . the right to use counsel at formal trial [would be] a very hallow thing [if], for all practical purposes, the conviction is already assured by a pre-trial examination . . . One can imagine a cynical prosecutor saying "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at trial."

Similarly, there is nothing that even the most vigorous defense attorney can do to ameliorate the prejudice of lost witnesses, faded memories beyond reconstruction and generally evidence qualitatively eroded by the passage of time. The Government's petition alluding to a trial defense of "uncommon quality and vigor" (Petitioner's Brief, pg. 25), and statements about the quantity of

defense witnesses circumvents the issue of fundamental fairness. Prejudice was born not only of the fact that Respondent produced only two alibi witnesses of his own, but by the relative quality of the defense witnesses whose memories were eroded by the passage of time. It is not the quantity of witnesses but the quality that is paramount. The issue is not the vigor of defense counsel, but his effectiveness.

The Ninth Circuit opinion seeks to attach the right to counsel at a meaningful juncture in Respondent's detention in administrative isolation. As the Court stated in Powell v. Alabama, 287 U.S. 45, 71 (1932), the duty to appoint counsel:

"is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the

preparation and trial of the case."

The Ninth Circuit opinion is correct in view of the "nature of the event and its effect on the rights involved." United States v. Marion, 404 U.S. 307, 327 (1971) (Douglas J. Concurring). While the Respondent was isolated in a jail within a prison, the Government within seven months built and preserved its case while the Respondent proceeded to lose his. Unlike the defendant in United States v. McDonald, 456 U.S. 1 (1981), Respondent did not have the assistance of an attorney, nor was he in the same posture as members of the general prison population who were free to partake in educational programs, work activities, and generally free to go about their affairs within the general prison setting. Respondent was isolated from the general

prison population, restricted to a one man cell up to twenty-three hours per day and unable to participate in the activities of the general prison population (C.R. No. 40, Reynoso Declaration). ^{2/} He was not free to devote his powers to preserving a defense, nor was he provided with the tools to do so.

The Ninth Circuit opinion is consistent with the concept of effective representation of counsel. Nevertheless, the Ninth Circuit's opinion is narrow in scope. It requires a number of pre-conditions to exist before the right to appointed counsel attaches. Initially, the inmate must be in isolation from the prison population; he must be in isolation

^{2/} "C.R." denotes the district court Clerk's Record in the case of the Gouveia respondents.

beyond a ninety-day period; he must be detained in isolation at least in part due to a felony investigation or for criminal trial; and he must be indigent. The Government is not obligated to provide counsel if the inmate is not indigent, or if he is in isolation due to purely administrative reasons. Additionally, the inmate in isolation must request the appointment of counsel. The rule provides the flexibility needed to accomodate legitimate administrative concerns, while at the same time assuring the inmate a fair trial.

B. Remedy of Dismissal

This Court, in United States v. Morrison, 449 U.S. 361, 365 (1981), stated that the remedy for Sixth Amendment deprevations should be tailored to the circumstances so as to assure the defendant effective assistance of counsel

and a fair trial. The Court in United States v. Morrison, supra, did not find adverse affect on the right to effective assistance of counsel by the mere fact that Drug Enforcement Agency agents attempted to solicit the defendant's cooperation without the presence of her attorney. In the present case, however, the Ninth Circuit recognized that Respondents' "isolation without assistance of counsel handicapped [Respondents'] ability to defend themselves at trial." United States vs. Gouveia, 704 F.2d 1116, 1125 (9th Cir. 1983).

The Ninth Circuit further recognized that:

"Prison crimes present suspects with unique investigatory and evidentiary obstacles. And, to repeat, the passage of time greatly exacerbates these difficulties. The length of the delay in appointing counsel for appellants who were likewise denied the opportunity to take measures to preserve their own defense means that the critical

initial stage of investigation was forever lost to appellants." 704 F.2d at 1125.

The prejudice suffered by the inability to locate inmate witnesses (whose names are not known); the inability to produce witnesses whose recollection of events are preserved by written statements; and the loss of witnesses due to death, are not within the class of prejudice that can be cured by a cautionary instruction to a jury, or by suppressing the introduction of Government evidence. The prejudice pervades the entire trial.

The dissenting opinion's contention, that "the likelihood of exonerating testimony from absent witnesses is preeminently a factual matter for the jury's determination ..." United States v. Gouveia, 704 F.2d 1116, 1129 (9th Cir. 1983), fails to recognize the impossibility of introducing into

evidence the expected testimony of a dead witness who has never either testified or been interviewed. At the district court level such exonerating testimony from Michael Thompson, a deceased witness, was rejected by the trial court. An admission by Michael Thompson that he, along with Steven Kennard and Willard Taylor, had killed Thomas Trejo was rejected as untrustworthy hearsay. (R.T. 2096-2111). 3/

The dissent's remedies fail to deal with the basic issue of fairness. It excuses the unjustified delay by the Government and the real advantage it thereby gained, and suggests that competent and vigorous counsel could not have assisted in the preservation of a

3/ "R. T." signifies the Reporter's Transcript in the district court case of the Gouveia Respondents.

defense if appointed some thirteen months earlier. The dissent also equates effective assistance of counsel with technically competent counsel. It fails to recognize, as this court recognized in Powell v. Alabama 287 U.S. 4571 (1932); Escobedo v. Illinois, 378 U.S. 478, 487-488 (1964); and, United States v. Marion, 404 U.S. 307, 327 (1971), that appointment of counsel to one accused must come at a point in time where counsel can be effective. The most competent of counsel can not raise the dead, restore lost memories, or locate those whose names are no longer known or capable of being known.

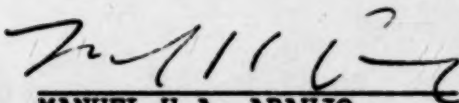
The Ninth Circuit majority recognized the particular need of an indigent inmate who has been isolated pending a criminal investigation to the appointment of counsel. It recognized that the defense had been permanently handicapped by the

long delay and the concurrent failure to appoint counsel. Unlike the facts present in United States v. Morrison, supra, respondents were prejudiced by the absence of counsel at a critical stage in the proceeding. The result reached by the Ninth Circuit was warranted under the facts of the case.

CONCLUSION

Based on the foregoing, the respondent Adolpho Reynoso urges that the Government's Petition be denied.

Respectfully Submitted



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